HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting.)

(Chapter VIII Rule 32 (2)(b)

Description of the case.

W.P. No. 589 (S/S) year 2001
(Old No. 48635 of 1999)

Smt. Usha Sharma
W/o Mahesh Chandra Sharma
Vs.
State of U.P. Through Secretary Education
Department, U.P. Lucknow and others.

Approved for reporting.

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~~Not approved for reporting~~

Date of decision 09.10.2003

Initial of Judge

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL..

Court No. 6

Civil Misc. Writ Petition No. 589(S/S)/2001
(Old No. 48635 of 1999)

Smt. Usha Sharma
W/o Mahesh Chandra Sharma
R/o village Sanyasiowala,
Post Jaspur Distt. U.S.Nagar ….Petitioner.

Vs.

1. State of U.P. through Secretary Education Department, U.P. Lucknow.

2. Joint Director of Education, Kumaon Region, Nainital.

3. Director of Education Allahabad, U.P. ….Respondents.

Counsel for petitioner -Sri Ramji Srivastava.
Counsel for respondents -Sri B.D. Kandpal.
Date of judgment - 09-10-2003

Hon'ble Rajesh Tandon, J.

By the present writ petition the petitioner has sought a writ, order or direction in the nature of mandamus directing the respondents to appoint the petitioner as a Lecturer in Civics of Assistant Teacher to teacher Home Science subject for which the petitioner is fully qualified and is entitled to be absorbed as per Government order dated 9th of August 1989. The contention of the petitioner further is that at least she may be considered for the said claim.

Heard Sri Ramji Srivastava learned counsel for the petitioner and Sri B.D. Kandpal Advocate for the respondents.

Brief facts giving rise to the present writ petitioner are that she has passed B.Sc. in Home Science, M.A. in Political Science and further Bed. And as such according to the petitioner she is fully qualified to be appointed as a lecturer in Political Science and Assistant Teacher of Home Science.

According to the petitioner she was appointed as a part time lecturer in Civics in Government Girls Inter College Jaspur, District Nainital vide order dated 7th of September 1987. She joined as a part time lecturer on 8th of September 1987. By policy decision dated 11th July and 9th August 1989 the

services of the petitioner were discontinued. However it was provided that the part time candidates who have rendered voluntary services they shall be called for the interview by the selection committee and will be considered for appointment on the basis of teaching experience.

The petitioner has alleged to have worked as part time lecturer in Civics in Government Girls Inter College Jaspur Nainital from 8th September 1987 to March 1988. Earlier the petitioner has applied for Assistant Teacher in Home Science and Lecturer in Civics but she was not called for interviews.

However on 18th October 1987 vacancies for Home Science Teacher was advertised along with other vacancies from the office of Joint Director, Education, Kumaun Region. The petitioner applied for the said post but she was not called for interview. Aggrieved by the said action of the respondents, she has field the writ petition No. 5762/1988 before the Allahabad High Cosurt. The writ petition was dismissed on 23.1.1988 with certain directions quoted below:-

> ***"The petitioner claims to have worked as a lecturer (Civics) in Govt Girls Inter College on part-time basis under voluntary service scheme. It is alleged that advertisement has been issued for regular appointment and further that the petitioner is entitled to be considered in accordance with Govt. order No. 4837/15-2-89-27(23/86 Shiksa Anubhag-2 dated 9th August, 1989 a copy of which has been annexed as Annexure-III to the writ petition. It is urged that despite the fact that petitioner fulfils the eligibility condition laid down in the said Government Order, the respondents are not accepting his form. There is, however, no material on record to substantiate the allegations that the applications form was submitted by petitioner in time but the same was not accepted by the respondents. The last date for submission of application expired on 20-11-1979.***
>
> ***Considering the fact that last date has already expired, I find no case made out for issue of writ prayed for. However, in case any future vacancy arises it shall be open to the petitioner to apply for the same and in that event his application shall be dealt with in accordance with G.O. referred to above.***
>
> ***In view of the above, the petition fails and is dismissed accordingly."***

Thereafter the petitioner came to know about the advertisement No.2 in Amar Ujala Newspaper dated 16-11-1998 which was advertised from the office of Joint Director, Education Kumaun, Nainital with regard to vacancy of Home Science Teacher. Although the petitioner ahs submitted her form but she was not called for interview. The petitioner has also claimed herself to be a candidate belonging to the category of handicapped. On failure of the

respondent Joint Director of Education, the petitioner has approached by way of the present petition.

The writ petition was filed on 22.11.1999 and at the time of the admission of the writ petition following order was passed:-

> ***"The contention of the petitioner is that this Court vide order dated 23.2.1998 passed in civil misc. writ petition NO. 5762 of 1998 had observed that in case any future vacancy arises it shall be open to the petitioner to apply for the same and in that event his application would petitioner to apply for the same and in that event his application would be dealt with in accordance with Government order dated 9-8-1989. According to the petitioner after aforesaid decision, the vacancy was advertised on 6.11.1998. The petitioner had applied for appointment but his case has not been considered.***
> ***Issue notice to the respondents. The respondents are represented by the learned Standing Counsel. He prays for and is granted one month's time to file counter affidavit. Petitioner shall rejoinder affidavit within two weeks thereafter. List it after expiry of aforesaid period.***

On 24-9-2003 Hon'ble Justice P.C. Verma was pleased to order to the following effect:-

> ***"Heard learned counsel for the parties. Joint Director shall appear before this Court on 29th of September 2003 on Monday along with the records of the impugned selection, in which the petitioner was not selected as alleged in the counter affidavit, along with the Subordinate Educational Service Grade Rules."***

Record therefore is available at the time of hearing of the writ petition.

Counter has already been field by the State of U.P. IN paragraphs 12 and 14 of the counter affidavit the State Government has admitted regarding the existence of the G.O. dated 9th August 1989. Paragraphs 12 and 14 are quoted below:-

12- यह कि याचिका के प्रस्तर 11 एवं 12 ाक अभिकथन के प्रति उत्तर है कि विज्ञापन के आधार पर कुमायूँ मण्डल में महिला विद्यालय हेतु गृह विज्ञान के 11 पद विज्ञापित किये गये जिन पर चयनापरान्त नियुक्तियां की गई। कोटे के अनुसार सामान्य वर्ग में गृह विज्ञान में 5 नियुक्तियां हुई है। विकलागों के लिये शासनादेष के अनुसार 2 प्रतिषत का आरक्षण है। (11) पदों पर आरक्षण 11/1 – 0.10 बनता है। फलतः विकलांग कोटे के अन्तर्गत नियुक्ति हेतु कोटा नहीं 100 बनता है, जिसके कारण विकलांग होतु हुए भी याची की नियुक्ति नहीं हो पायी।

14– यह कि याचिका के प्रस्तर–14 का अभिकथन अस्वीकार है। शासकीय आदेष दिनांक 9–8–89 के आधार पर केवल तदर्थ नियुक्तियों में अंषकालिक को बरीयता दिये जाने का प्राविधान था। नियमित नियुक्ति में नहीं। शासनादेष दिनां 9–8–89 की प्रति संलग्नक–3 याचिका में संलग्न है।

A perusal of the order passed by the Allahabad High Court dated 23-2-1998 shows that the petitioner was not considered as one of the candidate for

selection on account of the fact that last date for submission of application expired on 20-11-1979 and as such writ of mandamus was not issued. However considering the case of the petitioner direction was issued to the following effect:-

> ***"Considering the fact that last date has already expired, I find no case made out for issue of writ prayed for. However, in case any future vacancy arises it shall be open to the petitioner to apply for the same and in that event his application shall be dealt with in accordance with G.O. referred to above.***
> ***In view of the above, the petition fails and is dismissed accordingly.'***

Undisputedly the petitioner has applied on 27-11-1998 for Assistant Teacher in Home Science in pursuance of the vacancy which was advertised on 16-11-1998 from the office of Joint Director of Education Kumaun Region Nainital. There is no dispute that the application was submitted well within time.

The counsel for the petitioner Sri Ramji Srivastava has pointed out that in pursuance of the G.O. dated 11.4.1989 the candidature of the petitioner has to be considered. The G.O. darted 11.7.1989 provides as under:-

> *''1. नियमित नियुक्ति हेतु अर्हता रखने वाले तथा अवदेन करने वाले सभी अंषकालिक स्वयं सेवियों को चयन समिति व्दारा अनिवार्य रुप साक्षात्कार के लिये बुलाया जाये।*
>
> *2. धन की प्रक्रिया ने इन अंषकालिक स्वयं सेवियों को उनके षिक्षण अनुभव के आधार पर बरीयता प्रदान की जावे।*
>
> *3. अंषकालिक स्वयं सेवियों व्दारा किये गये षिक्षण कार्य की अवधि के बराबर उन्हें आयु सीमान में छूट प्रदान की जाये।''*

According to the counsel for the petitioner being part time lecturer she was entitled to be considered by the selection committee as the Government has provided a weightage to the part time lecturers by virtue of the G.O. dated 11th July 1989.

Sri B.D. Kandpal counsel for the respondents has submitted that although the petitioner has applied for selection of Assistant Teacher in Home Science but since the petitioner has not fulfilled the eligibility criteria therefore she could not have been considered. Sri B.D. Kandpal has also referred the Government Order dated 24th October 1998 which provides that the consideration regarding part time lecturers is not possible and the Government has decided not to consider the same. The G.O. also contained the averments that some of the part time lecturers have already been given appointment and

now it is not possible to accommodate the remaining candidates. The contents of the G.O. are quoted below:-

'' उपयुर्क्त विषयक निदेषालय के अद्वेषासकीय प0सं0 (प्रवक्ता) /8034/98–99 दिनांक 15.9.98 के सन्दर्भ में मुझे यह कहने का निदेष हुआ है कि पूर्व में अधिकाषं अंषकालिक स्वयंसेवी षिक्षकों को नियुक्ति दे दी गई थी। षेष स्वयं सेवियों को पदों की अनुपलब्धता अथवा उनके अनर्ह होने के कारण नियुक्ति प्रदान करना सम्भव न हुआ। अतः अब लगभग 8–9 वर्ष पष्चात इनकी नियुक्ति प्रकरण पर विचान न किये जाने का निर्णय शासन व्दारा लिया जा चुका है।''

The aforesaid G.O. has not been field along with the counter affidavit and the same has been produced during the hearing of the case by the Joint Director of Education who is personally present in the Court by virtue of order dated 24th September 2003.

The aforesaid G.O. is silent regarding the earlier G.O. dated 11th July 1989. The G.O. dated 11th July 1989 was passed considering the fact that there has been a complete unemployment of part time lecturers and as such a policy of rehabilitation came into light by virtue of the G.O. dated 11th July 1989.

The counsel for the respondent Sri B.D. Kandpal has also pointed out that so far as candidates like the petitioner i.e. handicapped there is a reservation which may be called as a horizontal reservation by virtue of gazette notification dated 31st July 1997. The same is incorporated as under:-

''(दो) ऐसी लोक सेवाओं और पदों में जैसा राज्य सरकार अधिसूचना व्दारा, अभिज्ञात करें, रिक्तियों का एक प्रतिषत प्रत्येक निम्नलिखित से ग्रसित ब्यक्ति के लिएः–

(क) दृष्टिहीनता या कम दृष्टिः

(ख) श्रवण ह्रासः

(चलन क्रिया समबन्धी निषक्तताता या प्रमस्तिश्कीय अंगघात।''

The eligibility criteria as contained in the G.O. on point No.1 is also contained under the rules framed under U.P. Subordinate Services Rules Niyamawali 1983. Clause-10 which is relevant is quoted below:-

''10– सीधी भर्ती के लिए अभ्यर्थी की आयु जिस वर्ष भर्ती की जानी हो उस वर्ष की पहली जनवरी को, यदि पद पहली जनवरी से 30 जून की अवधि में विज्ञापित किये जायें और पहली जुलाई को, यदि पद पहली जुलाई से 31 दिसम्बर की अवधि में विज्ञापित किये जायें, 21 वर्ष की अवष्य हो जानी चाहियें और 30 वर्ष से अधिक नहीं होनी चाहिए।

परन्तु अनुसूचित जातियों, अनुसूचित जनजातियों और ऐसी अन्य श्रेणियों के जो सरकार व्दारा समय समय पर अधिसूचित की जायें, अभ्यर्थियों की स्थिति में उच्चतर आयु सीमा उतने वर्ष अधिक होगी जितनी विनिदिर्ष्ट की जाय।''

There is nothing in the counter affidavit to suggest that the petitioner was not considered because of the infirmities contained in the Niyamawali i.e. with regard to the age or lapse of the G.O. dated 11th July 1989. To the contrary

as will appear from the counter affidavit in paragraph-14 it has been admitted to the following effect:-

> *'' यह कि याचिका के प्रस्तर–14 का अभिकथन अस्वीकार है। शासकीय आदेष दिनांक 9–8–89 के आधार पर केवल तदर्थ नियुक्तियों में अंषकालिक को बरीयता दिये जाने का प्राविधान था। नियममित नियुक्ति में नही ।षासनादेष दिनांक 9–8–89 की प्रति संलग्नक –3 के रूप में याचिका में संलग्न है।''*

A perusal of the U.P. Secondary Education (Services Selection Board) Act 1982 provides that the Board may with the prior approval of the State Government, make or amend regulations prescribing fees for holding selections, for holding interviews and laying down the procedure to be followed by the Commission for discharging its duties and performing its functions under this Act. The relevant section 34 is quoted below:-

> ***" Power to make regulations-(1) The (Board) may, with the prior approval of the State Government, make or amend regulations prescribing fees for holding selections, for holding interviews and laying down the procedure to be followed by the Commission for discharging its duties and performing its functions under this Act.***
>
> ***Provided that the first regulation under this sub-section shall be made by the State Government by notification in the gazette:***
>
> ***(2) The regulations made under sub-section shall be inconsistent with the provisions of this Act or the rules made under Section 35."***
>
> ***The Board has been defined under section 3 as under:-***
>
> ***" Establishment of the Board : (1) With effect from such date as the State Government may, by notification, appoint in this behalf, there shall be established a Board to be called the Uttar Pradesh Secondary Education Services Selection Board.***
> ***(2) The Board shall be a body corporate. It shall exercise powers throughout Uttar Pradesh and its headquarters shall be at Allahabad.***
> ***(3) The Uttar Pradesh Secondary Education Services Commission established under section 3 of this Act as it stood immediately before the commencement of the Uttar Pradesh Secondary Education Services Commission (Amendment)Act, 1998, shall upon establishment of the Board under sub-section (1), stand dissolved, and upon such dissolution-***
> ***(a) All properties and obligations of that commission shall stand transferred to, and vest in the Board;***
> ***(b) all debts, liabilities and obligations of that commission whether contractual or otherwise, shall stand transferred to the Board;***
> ***(c) the services of every whole-time employee of that commission shall stand transferred to the Board;***
> ***(d) any matter pending before that commission under this Act as it stood immediately before establishment of the Board under sub-section (1) shall stand transferred to the Board."***

Section 9 of the U.P. Secondary Education (Services Selection Board) Act 1982 provides the powers and duties of the Board. Clause (a) of section- 9 provides as under:-

> "9. Powers and duties of the Board:- The Board shall have the following powers and duties namely:-
>
> (a) to prepare guidelines on matters relating to the method of direct recruitment of teachers:"

As will appear from clause (a) of section -9 of U.P. Secondary Education (Services Selection Board) Act 1982 that the Board has every power to prepare the guidelines on matters relating to the method of direct recruitment of teachers. In view of the aforesaid facts and circumstances the Board has every power to prepare guidelines on matter relating to the method of direct recruitment of the teachers, the eligibility criteria is also one of the guidelines which the Board is empowered to do.

In view of the facts and circumstances, in view of the G.O. dated 115th July 1989, which provides a rehabilitation policy for the part time lecturers, it was incumbent upon Joint Director to have passed an order approving or rejecting the candidature of the petitioner from the zone of consideration for selection of Assistant Teacher.

A perusal of the original record shows that there is no order of the respondents; either admitting the form or rejecting the same.

Taking into consideration the G.O. of 1989, suffice it is to state that if the G.O. dated 11-7-1989 is still in operation the petitioner was entitled for relaxation of her age along with the weightage of part time lecturer.

It is established principles of Administrative Law that right to reason is an indispensable part of justice, the authorities concerned should have passed a specific order either admitting the form of the petitioner or rejecting the same from the zone of consideration as for the selection of candidate.

The Apex Court in the case of ***Sompal vs. Deputy Director of Consolidation Badaun and others, 2003 (94) RD 669*** has held as under-

> ***" The requirement of recording reasons and analytical discussion of the respective contentions and the evidence adduced in the case is intended to ensure fairness in the administration of justice as observed by this Court in a recent decision rendered in Civil Misc. Writ Petition No. 13384 of 2003 Tirathraj v. Deputy Director Consolidation Mirzapur and others. It has been recently observed by the Apex Court in Ram Ashrey Singh v. Ram Bux Singh, as under:***

Right to reason is an indispensable part of a sound judicial system. Another rationale is that the affected party can know why the decision has gone against him. One of the Salutary requirements of natural justice is spelling out reasons for the order made, in other words a speaking out. The inscrutable face of a sphinx is ordinarily incongruous with a judicial or quasi judicial performance.

The reason for exercising discretion must be cogent and convincing and must appear on the fact of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to the rules of reason and justice, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular (see Susannah Sharp v. Wakefield (1891) AC 173, 179).”

Apart from that natural justice also requires that before eliminating the petitioner from the zone of consideration there should be an application of mind in view of the judgment of Apex Court in the case of ***Menka Gandhi v. Union of India, (1978) 1 Supreme Court case page 248*** which is quoted below:-

“It is well established that even where there is no specific provision in a statute or rules made there under for showing cause against action that proposed to be taken against an individual, which affects the right of individual, the duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority which has the power to take punitive or damaging action. This principal was laid down by this Court in the State of Orissa v. Dr. (Miss) Binapani Dei in the following words:

The rule that a party to whose prejudice an order is intended to be passed is entitle to a hearing applies alike to judicial tribunals and involving civil consequences. It is one of the fundamental rules of our constitutional set-up that every citizen is protected against exercise of arbitrary authority by the State or its Officers. Duty to act judicially would, therefore arise from the very nature of the function intended to be performed: it need not be shown to be superadded. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice be ignored and an order to the prejudice of a person is made, the order is a nullity. That is a basic concept of the rule of law and importance; thereof transcends the significance of a decision in any particular case.

In England, the rule was thus expressed by Byles, J. In Cooper v. Wandsworth Board of Works

The laws of God and man both give the party an opportunity to make his defence, if he has any, In remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defence. “Adam” (says God), “where art thou? Hast thou not eaten of the tree whereof I commanded thee thou shouldest not eat?” And the same question was put to Eve also.”

In D.K. Yadav V. J.M.A. Industries Ltd, (1993) 3 Supreme Court Cases page 259 it has been held that the duty to give reasonable opportunity to be heard also applies to executive authorities which take administrative action. The observations of the Apex Court are quoted below:-

> ***"They have a duty to proceed in a way which is free from even the appearance of arbitrariness, unreasonableness or unfairness. They have to act in a manner which is patently impartial and meets the requirements of natural justice."***

In view of the aforesaid observations without entering into merits of the eligibility criteria, suffice it is to state that respondent No.2 shall pass appropriate orders on his application considering the vacancy and all the norms which have been stated above within a period of one month from the date of filing of the certified copy of the order.

With the aforesaid observations the writ petition is allowed. There will be no order as to costs.

Dated: 9-10-2003 **(Raejsh Tandon J.)**

ISB